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Ambank (M) Bhd v Hermie bin Mohd Tahir

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HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO WA-12BM-1–06 OF 2022
MOHD RADZI HARUN J
6 FEBRUARY 2024

C

Civil Procedure — Locus standi — Failure of trial judge to determine issue — Defendant questioned plaintiff's locus standi to sue him on ground they had no privity of contract — Trial judge by-passed determination of locus standi issue and went on to determine defendant's liability — Whether trial judge's approach was wrong and retrial of suit before different judge had to be ordered

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The respondent was an employee of Telecom Malaysia Bhd ('TM') and was granted a financing facility ('the facility') by TM to buy a house. The grant of the facility was formalised in an agreement between TM and the respondent. For the purposes of its staff housing scheme, TM had, inter alia, appointed the appellant as its agent to perform certain functions under a 'servicer agreement'. When the appellant sued the respondent in the sessions court to recover the amount owing under the facility, the respondent disputed the appellant's locus standi to sue him, arguing that his contract was with TM and that he had no privity of contract with the appellant. When testifying at the trial, the respondent admitted that he owed TM RM473,029.53 under the facility but disputed the amount that was claimed in the appellant's suit. The trial judge dismissed the appellant's claim solely on the ground that it failed to produce a certificate of indebtedness showing the amount owed by the respondent. The trial judge held that both the property sale agreement (between TM and the respondent) and the deed of assignment (between TM and the appellant) provided that the respondent's debt to the appellant shall be proven by a certificate of indebtedness. In the instant appeal, the appellant argued that the trial judge's decision was wrong because even though the certificate of indebtedness was not produced, two of the appellant's witnesses (SP1 and SP2) had testified that the respondent owed RM476,456.51 under the facility and that evidence taken together with the respondent's admission of indebtedness was sufficient for the trial judge to have allowed the appellant's claim. The trial judge held that since she had decided that the appellant's claim was unsustainable on the ground of its failure to produce the certificate of indebtedness, it was not necessary for her to decide any other issues raised in the suit including the respondent's main defence that the appellant had no locus standi to sue him.

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Held, ordering a retrial of the appellant's suit before a different sessions court judge:

(1) The trial judge should have first of all resolved the issue of the appellant's locus standi. This was an issue that was raised repeatedly by the respondent in his pleadings. The trial judge held that there was no necessity for her to address the issue because the common issue to be tried as agreed between the parties was whether the respondent was liable to pay the amount claimed by the appellant. At the end of her grounds of judgment, the trial judge concluded that as she had found the appellant's claim to be unsustainable — solely on the ground that no certificate of indebtedness was produced — there was no need for her to address the issue of locus standi or any other issues for that matter. This was fundamentally flawed. The trial judge erred when she decided to deal with the issue of liability without first dealing with the preliminary and vital issue of the appellant's locus standi (see para 26).

(2) The trial judge should have satisfied herself that the appellant was legally entitled to make the claim against the respondent. Once that threshold was passed, only then could she have proceeded to deal with the rest of the issues before her. If the answer to the first question was in the negative, then the appellant's claim had to be dismissed in limine. She could only have done that if she was appraised with the complete documents and evidence (see para 27).

(3) The trial judge committed a grave error in failing to call for the production of all documents that were relevant to the issues at trial and which were referred to in the pleadings and/or documents before the court. She had made a final determination on the matter without considering the entirety of the critical documents pertaining to the case and had therefore not decided the matter before her justly. The completed purchase contract was never produced before the trial judge and it was never considered by her. Due to this major oversight on the part of the trial judge, she was not able to determine the legal nexus between the parties and consequently was unable to determine the fundamental issue of the appellant's locus standi. The failure and errors of the trial judge were so fundamental and grave that this court had no choice but to order a retrial of the suit before another sessions court judge (see paras 22 & 32–34).

(4) This court agreed with the trial judge that the appellant's failure to furnish the certificate of indebtedness was fatal. The certificate of indebtedness dealt with both the issues of liability and quantum claimed by the appellant. Once that was shown to the court, the onus would shift to the respondent to prove manifest error in the amount stated in the certificate. The trial judge was correct in holding that although the respondent had admitted his indebtedness in his evidence that alone was

insufficient and inconclusive to prove his indebtedness, in particular as to the amount owed. Despite admitting his indebtedness, the respondent had vehemently questioned the amount he owed. This had to be proven by the appellant through the certificate of indebtedness. However, the trial judge's decision to dismiss the appellant's case solely on the ground of its failure to produce the certificate was wrong (see paras 23–24).

[Bahasa Malaysia summary

Responden adalah pekerja Telekom Malaysia Bhd ('TM') dan telah diberikan kemudahan pembiayaan ('fasiliti') oleh TM untuk membeli rumah. Pemberian kemudahan itu telah diformalkan dalam perjanjian antara TM dan responden. Untuk tujuan skim perumahan kakitangannya, TM telah, antara lain, melantik perayu sebagai ejennya untuk melaksanakan fungsi tertentu di bawah 'Perjanjian Perkhidmatan'. Apabila perayu menyaman responden di mahkamah sesyen untuk mendapatkan semula amaun yang terhutang di bawah kemudahan itu, responden mempertikaikan locus standi perayu untuk menyamannya, dengan alasan bahawa kontraknya adalah dengan TM dan bahawa dia tidak mengetahui mengenai kontrak yang dibuat dengan perayu. Ketika memberi keterangan semasa perbicaraan, responden mengakui bahawa dia berhutang dengan TM RM473,029.53 di bawah kemudahan itu tetapi mempertikaikan jumlah yang dituntut dalam saman perayu. Hakim bicara menolak tuntutan perayu semata-mata atas alasan ia gagal mengemukakan sijil keberhutangan yang menunjukkan jumlah terhutang oleh responden. Hakim bicara memutuskan bahawa kedua-dua perjanjian jualan harta (antara TM dan responden) dan surat ikatan serah hak (antara TM dan perayu) dengan syarat hutang responden kepada perayu hendaklah dibuktikan dengan perakuan keberhutangan. Dalam rayuan semula, perayu berhujah bahawa keputusan hakim bicara adalah salah kerana walaupun sijil keberhutangan tidak dikemukakan, dua daripada saksi perayu (SP1 dan SP2) telah memberi keterangan bahawa responden berhutang RM476,456.51 di bawah kemudahan itu dan bahawa keterangan yang diambil bersama dengan pengakuan keberhutangan responden adalah memadai untuk hakim bicara membenarkan tuntutan perayu. Hakim perbicaraan berpendapat bahawa oleh kerana beliau telah memutuskan bahawa tuntutan perayu adalah tidak mampan atas alasan kegagalannya mengemukakan sijil keberhutangan, adalah tidak perlu bagi beliau untuk memutuskan sebarang isu lain yang dibangkitkan dalam saman itu termasuk pembelaan utama responden bahawa perayu tidak mempunyai locus standi untuk menyamannya.

Diputuskan, memerintahkan perbicaraan semula guaman perayu dihadapan hakim mahkamah sesyen yang berbeza:

(1) Hakim bicara sepatutnya terlebih dahulu menyelesaikan isu locus standi perayu. Ini adalah isu yang dibangkitkan berulang kali oleh responden dalam plidingnya. Hakim bicara berpendapat bahawa tidak ada

keperluan untuk beliau menangani isu itu kerana isu biasa yang perlu dibicarakan seperti yang dipersetujui antara pihak adalah sama ada responden bertanggungjawab untuk membayar jumlah yang dituntut oleh perayu. Di hujung alasan penghakimannya, hakim bicara membuat kesimpulan bahawa kerana dia mendapati tuntutan perayu tidak mampan — semata-mata atas alasan tiada sijil keberhutangan dikeluarkan — tiada keperluan untuk beliau menangani isu locus standi atau sebarang isu lain untuk perkara tersebut. Ini pada asasnya adalah cacat. Hakim bicara terkhilaf apabila beliau memutuskan untuk menangani isu liabiliti tanpa terlebih dahulu menangani isu awal dan penting iaitu locus standi perayu (lihat perenggan 26).

(2) Hakim bicara sepatutnya berpuas hati bahawa perayu berhak di sisi undang-undang untuk membuat tuntutan terhadap responden. Setelah isu tersebut diselesaikan, barulah beliau boleh terus untuk menangani isu-isu lain di hadapannya. Jika jawapan kepada soalan pertama adalah negatif, maka tuntutan perayu terpaksa ditolak setakat ini. Dia hanya boleh melakukannya jika dia dinilai dengan dokumen dan bukti yang lengkap (lihat perenggan 27).

(3) Hakim bicara melakukan kekhilafan apabila gagal memanggil semua dokumen yang berkaitan dengan isu-isu dalam perbicaraan dan yang dirujuk dalam pliding dan/atau dokumen di hadapan mahkamah. Beliau telah membuat penentuan muktamad mengenai perkara itu tanpa mengambil kira keseluruhan dokumen penting yang berkaitan dengan kes itu dan oleh itu tidak memutuskan perkara itu di hadapannya secara adil. Kontrak pembelian yang lengkap tidak pernah dikemukakan di hadapan hakim bicara dan ia tidak pernah dipertimbangkan olehnya. Disebabkan oleh kekhilafan besar di pihak hakim bicara, beliau tidak dapat menentukan perhubungan undang-undang antara pihak-pihak dan akibatnya tidak dapat menentukan isu asas locus standi perayu. Kegagalan dan kekhilafan hakim bicara adalah sangat asas dan serius sehingga mahkamah ini tidak mempunyai pilihan selain memerintahkan perbicaraan semula saman itu di hadapan hakim mahkamah sesyen lain (lihat perenggan 22 & 32–34).

(4) Mahkamah ini bersetuju dengan hakim bicara bahawa kegagalan perayu untuk memberikan sijil keberhutangan adalah memudaratkan kes perayu. Sijil keberhutangan mengurus kedua-dua isu liabiliti dan kuantum yang dituntut oleh perayu. Apabila itu ditunjukkan kepada mahkamah, tanggungjawab akan beralih kepada responden untuk membuktikan kesilapan nyata dalam jumlah yang dinyatakan dalam sijil. Hakim bicara adalah betul dalam berpendapat bahawa walaupun responden telah mengakui keterhutangannya dalam keterangannya itu sahaja tidak mencukupi dan tidak konklusif untuk membuktikan keterhutangannya, khususnya mengenai jumlah yang terhutang.

Walaupun mengaku terhutang budi, responden telah mempersoalkan sekeras-kerasnya jumlah hutangnya. Perkara ini perlu dibuktikan oleh perayu melalui perakuan keberhutangan. Bagaimanapun, keputusan hakim bicara untuk menolak kes perayu semata-mata atas alasan kegagalannya mengemukakan sijil adalah salah (lihat perenggan 23–24).]

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783, SC (refd)
Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685; [2006] 3 CLJ 544, FC (refd)
Chen v Ng (British Virgin Islands) [2017] UKPC 27, PC (refd)
Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282; [1980] 1 LNS 168, FC (refd)
Nik Che Kok @ Nik Soo Kok v Public Bank Bhd [2001] 2 MLJ 328; [2001] 2 CLJ 157, CA (refd)
O' Day v Commercial Bank of Australia Ltd [1993] 50 CLR 200, HC (refd)
RHB Bank Bhd v Tan Swee Long Holdings Sdn Bhd & Ors [2008] 3 MLJ 130; [2008] 10 CLJ 519, HC (refd)

Legislation referred to

Evidence Act 1950 s 101
Rules of Court 2012 O 24 r 12

Vischaal Yogaratnam (with Nievanee Ravindran) (Vas & Co) for the appellant.
Mohammed Nasser bin Yusof (with V Mugunthan) (The Law Chambers of Fauzi & Nasser) for the respondent.

Mohd Radzi Harun J:

INTRODUCTION

[1] This court had partially allowed the appellant's appeal and ordered a retrial of the civil action brought by the appellant against the respondent and that the retrial is to be heard by a different sessions court judge.

[2] The respondent is aggrieved by that decision.

BACKGROUND

[3] The appellant's/plaintiff's case before the learned sessions court judge was a straight forward one — whether the respondent/defendant owed the appellant the sum claimed. The respondent did not deny he owed a certain sum but he argued he owed the sum to his employer Telekom Malaysia Bhd ('TM')

and not the appellant. He questioned the locus standi of the appellant bringing the case against him as his contract was concluded with TM and never the appellant. The appellant brought this appeal before this court as the learned trial judge dismissed the appellant's case solely on the ground that the appellant failed to exhibit the certificate of indebtedness.

[4] The respondent was an employee at TM. As an employee, the respondent is eligible for housing financing facility with terms as set under the TM Staff Housing Facility/Scheme ('TM Staff Housing Scheme'). The TM Staff Housing Scheme is devised according to Shariah Principle of Bai' Bithaman Ajil.

[5] For purposes of the TM Staff Housing Scheme, TM signed the 'servicer agreement' dated 27 May 2009 with AmMortgage, Ambank and Pacific Trustees. Under that agreement, TM appointed AmBank as its agent to perform functions with respect to the TM Staff Housing Scheme, and AmBank Mortgage appointed AmBank as the lawful agent of purchasers. The respondent falls under the definition of purchaser.

[6] Vide a sale and purchase agreement dated 12 May 2014 between the respondent and Amerin Residence Sdn Bhd, the respondent purchased an apartment at B-16-7, Tower B, Amerin Mall, Kajang ('the apartment'). The brief details of the purchase are as follows:

Price of Apartment	:	RM481,000
Fire Insurance	:	RM3,735
Mortgage Reducing Term Assurance (MRTA)	:	RM14,836
Total	:	RM499,571

[7] For purposes of the said purchase, the respondent applied for the TM Staff Housing Scheme. TM issued a letter of offer to the respondent dated 3 July 2014 where TM agreed to fully financed the total purchase price of the apartment amounting to RM499,571, with an agreed purchase price pursuant to the Shariah Principle of Bai' Bithaman Ajil at RM1,010,664.

[8] The respondent and TM then entered into the property purchase agreement dated 16 December 2014 where the respondent sold the apartment to TM and TM purchased the apartment with agreed purchase price of RM1,010,664. The monthly instalment is RM4,679, but after deducting the Muqassah (discount) which the respondent was entitled pursuant to the TM Staff Housing Scheme, the respondent's monthly instalment is RM3,249 for the period of 216 months (18 years). Beneficial ownership and rights over the apartment passed to TM by virtue of the said property purchase agreement.

[9] With that background, it was clear that there was no loan agreement signed by the respondent with any financial institution. The only 'loan agreement' signed by respondent was the property purchase agreement dated 16 December 2014.

THE DECISION OF THE SESSIONS COURT JUDGE

[10] The learned sessions court judge ruled that the appellant's claim is for recovery of debt, which shall be proven by the appellant that the respondent failed to pay despite the demand to do so. The existence of the respondent's debt to the appellant shall be proven through a certificate of indebtedness. This is provided in para 11.03 of the property sale agreement dated 16 December 2014, and section 13.14 of the deed of assignment of the same date.

[11] The appellant failed to show the certificate of indebtedness and the appellant's witnesses, SP1 and SP2 both testified on the amount of RM476,456.51 owed by the respondent to the appellant but did not substantiate their testimony with any document.

[12] The appellant's counsel argued that there was no necessity for the appellant to prove the respondent's indebtedness as the respondent himself had admitted his debts during his testimony when cross-examined by the appellant's counsel:

> S: Adakah Encik mempertikaikan jumlah RM473,029.53 di mana-mana dalam dokumen di sini?
>
> J: Tidak.
>
> S: Okay setuju saya kata encik mempunyai tanggungjawab untuk membayar balik pembiayaan ini kepada Telekom. Setuju atau tidak?
>
> J: Setuju Puan Hakim.

[13] The learned trial judge then dismissed the appellant's case when she concluded that despite that testimony, the appellant failed to bring in documentary evidence in the form of certificate of indebtedness to support the oral evidence. Without the certificate, the court cannot accept the correctness or otherwise of the amount stated in the appellant's claim. The trial judge decided that as the main claim of the appellant was dismissed, there was no necessity for her to make any findings on the other issues raised by parties, including the main defence of the respondent that the appellant's case must be dismissed in limine as the appellant lacked locus standi to bring this action against the respondent.

A FINDINGS

[14] The main complaint of the appellant before this court was that the learned sessions judge erred when she dismissed the appellant's claim despite the appellant having proven its case that the respondent owed to it the sum claimed based on the respondent's unequivocal admission of debt in his evidence during the trial.

[15] The respondent argued that the learned trial judge was correct in dismissing the appellant claims. Paragraph 11.03 of the property purchase agreement dated 16 December 2014 provides specifically that any admission or acknowledgement by the respondent to be conclusive evidence of indebtedness must be made in writing by the respondent. This provision is repeated in section 13.14 of the deed of assignment signed between TM and the appellant on the same date. That proof is through the certificate of indebtedness which the appellant had failed to furnish. The respondent further argued that the appellant failed to prove the actual amount he owed to the appellant. The respondent cited s 101 of the Evidence Act 1950 that the burden is always on the plaintiff to proof its case.

[16] Relying on *RHB Bank Bhd v Tan Swee Long Holdings Sdn Bhd & Ors* [2008] 3 MLJ 130; [2008] 10 CLJ 519, the appellant argued that the respondent's mere denial of the amount he is indebted to the appellant is insufficient. The appellant argued that the respondent's defence must collapse as he failed to plead the relevant facts to negate the existence of the debt or to show the claim is not maintainable. This was made worse by the respondent's admission of his indebtedness during the trial.

[17] On the appellant's contention that the respondent's defence on his indebtedness must fail due to the respondent's failure to plead the relevant facts to negate the existence of the debt or to show the claim is not maintainable issue, this court ruled that the appellant was wrong. Paragraphs 11 and 12 of the respondent's defence at the court below stated clearly that the respondent denies all claims of the appellant as the appellant has no locus standi to this claim as there was no privity of contract between the appellant and the respondent. The respondent further pleaded in his defence that he has no knowledge of all the reliefs claimed by the appellant in para 9 of its amended SOC. This pleading again pivoted on the crux of the respondent's defence that there was no privity of contract between him and the appellant as the agreement he has on the purchase of the apartment was only with TM. This court ruled that such pleading tantamount to the respondent sufficiently pleaded the relevant facts to negate the existence of the debt and having shown that the appellant's claim is not maintainable.

[18] It is trite that an appeal is a re-hearing of the matter. As such this court is entitle to view all relevant documents, including to call for documents which were not available at the proceedings at the court below which this court requires to ensure those documents are necessary to enable this court is seised with the complete documents that will result in the just and fair disposal of the appeal.

[19] For this purpose, this court had specifically asked for the appellant to furnish the following documents:

(a) the purported letter of demand ('LOD') dated 4 September 2018: the LOD was mentioned by the appellant's witness to have been issued by the appellant on 4 September 2018 to the respondent. The letter of demand is crucial to be viewed by the trial court and in this appeal as it is trite that a demand is necessary for the purpose of bringing home to the debtor that the creditor is demanding its money: *Nik Che Kok @ Nik Soo Kok v Public Bank Bhd* [2001] 2 MLJ 328; [2001] 2 CLJ 157, *O' Day v Commercial Bank of Australia Ltd* [1993] 50 CLR 200;

(b) the master sale and purchase agreement: this document formed part of the servicer agreement. This document is crucial to be examined by the trial court and in this appeal as it listed out the actual assets governed by the servicer agreement; and

(c) Schedule 4A of the servicer agreement: this Schedule 4A is crucial to be examined by the trial court and in this appeal as the servicer agreement mentions 'Parkside Power Attorney' whose details are found in Schedule 4A to the Agreement. The servicer agreement before this court is incomplete as it was without this Schedule 4A. Counsels confirmed that this Schedule 4A was also not provided to the trial judge.

[20] Apart from the reasons I had intimated in the preceding paragraph, I had also requested for these documents to be furnished particularly when the first document was pleaded in the plaintiff's statement of claim, and the second and third documents formed the main part of the servicer agreement. This instruction is in consonant with the powers of this court under O 24 r 12.

[21] This court is mindful of the legal proposition that the public policy of the law is that it is in the public interest that there should be finality in litigation — interest *rei publicae ut sit finis litium*. See: Supreme Court in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783. But it is trite law that finality cannot undermine justice and fairness to all parties in the litigation. At a relatively high level of generality, in such a case an appellate court should have in mind two conflicting principles: the need for finality and minimising costs in litigation, on the one hand, and the even more important requirement of a fair trial, on the other: per

Lord Neuberger and Lord Mance in *Chen v Ng (British Virgin Islands)* [2017] UKPC 27 (PC).

[22] In the interest of justice of the parties concerned, and particularly when the documents I sought are not only relevant to the issue at trial, but were referred to in the pleadings and/or the documents before the court, certainly this court cannot be faulted for making a finding that the learned trial judge had committed a grievous error for her failure in not calling for these missing documents and that she made her final determination of the matter before her without the benefit of considering the entirety of the documents goes into the core of the appeal. The trial judge made a finding without considering critical documents which could have enabled her to decide the matter before her justly.

[23] This court agrees with the learned trial judge that the appellant's failure to furnish the certificate of indebtedness was fatal. The Federal Court in *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685; [2006] 3 CLJ 544 cited Raja Azlan Shah CJM (as His Highness then was) in *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282; [1980] 1 LNS 168 where he held:

> We have often said in this court many a time that where the issues are clear and the matter of substance can be decided once and for all without going to trial there is no reason why the Assistant Registrar or the judge in chambers, or, for that matter, this court shall not deal with the whole matter under the RSC. Order 14 procedure. In the present case, the guarantee contains a clause which enables the bank by producing a certificate of indebtedness by its officer to dispense with legal proof of the actual indebtedness of the respondents ... It means that, for the purpose of fixing liability of the respondents, the company's indebtedness may be ascertained conclusively by a certificate.

The Federal Court then continued:

> The above dictum establishes firmly the conclusive nature and extent of a certificate of indebtedness. A certificate of indebtedness operates in the field of adjectival law. It excuses the plaintiff from adducing proof of debt. Such a certificate shifts the burden onto the defendant to disprove the amount claimed.

[24] In short, the certificate of indebtedness deals with both the issue of liability and quantum claimed by the appellant. Once that is shown to the court, the onus is shifted to the respondent as the borrower to prove manifest error on the amount stated in the certificate. The trial judge was correct that despite the respondent having admitted his indebtedness to the appellant in his evidence, that alone was insufficient and inconclusive to prove the respondent's indebtedness, in particular the amount owed. Despite admitting his indebtedness to the appellant, the respondent had vehemently questioned the

amount he owed. This must be proven by the appellant through the certificate of indebtedness. But the trial judge's decision to dismiss the appellant's case on that fact alone was wrong.

[25] I had asked about the LOD that was mentioned in para 7 of the re-amended SOC which was not referred to by the learned trial judge during the course of the trial. The response given to me was that the amount in the LOD is the same with the amount in the SOC. Having perused the LOD at p 219 of *Rekod Rayuan Tambahan* 3, I found that the amount in those two documents differs. I am aware it must be due to the accumulated interests etc as the amount in the LOD was as at 3 September 2018 (RM473,029.53) whereas the amount in the SOC is as at 2 October 2018 (RM476,456.51). But this LOD should have been referred to by the trial judge, even if it was not raised by the parties as it was clearly pleaded in the SOC but not provided before her.

[26] What is most important for the trial judge to deal with at the beginning of her finding is to firstly resolve the issue of locus standi of the appellant/plaintiff before her. This was an issue that had been raised repeatedly by the respondent/defendant in his pleadings. Although she mentioned this issue in para 7 of her grounds of judgment, but the trial judge decided to do so in a mere one-liner. She concluded that there was no necessity for her to address the issue because she concluded that the common issues to be tried as agreed by parties is whether the respondent is liable to pay the amount claimed by the appellant. At the end of her grounds of judgment, the learned trial judge concluded that as she found that the appellant's claim cannot be sustained — grounded solely on the non-availability of the certificate of indebtedness — there is no necessity for her to answer the issue on the appellant's locus raised in the defence or any other issues for that matter. This is fundamentally flawed. The learned trial judge has erred when she decided to deal with the issue of liability without first dealing with the preliminary and vital issue on the appellant's locus.

[27] She must be satisfied that the plaintiff is legally entitled to make the claim against the defendant. Once that threshold is passed, only then she can proceed to deal with the rest of the issues before her. If the answer to that first question is in the negative then the plaintiff's claim must be dismissed in limine. She can only do so if she is appraised with the complete documents and evidence.

[28] The respondent never denied he took up a loan of about RM500,000 for the purchase of the apartment. But the respondent denies that he took up that loan or facility from the appellant. He pleaded that the loan and contract was between him and TM and not with the appellant.

[29] The subject matter of the master sale and purchase agreement signed between AmMortgage One Bhd, TM and Pacific Trustees dated 27 May 2009 concerns mainly, among others, the selling of PORTFOLIOS by TM to AmMortgage One Bhd. PORTFOLIOS is defined in the Agreement as 'Active and Non-Active Portfolios'. Active Portfolio is set out in Appendix 3, but when I flipped Appendix 3 there was nothing there. Non-Active Portfolio is defined as 'all Assets in respect of which the corresponding Obligor is (defined — defendant seemed to be included in the definition of Obligor) no longer an employee which Non-Active Portfolio will be set out in detail in the relevant Purchase Contract to be executed between the Purchaser (AmMortgage) and the Seller (TM) thereto'. Purchase contract is defined as shown in Appendix 2. And Appendix 1 to this purchase contract will detail out the outstanding portfolios that are the subject of this purchase contract.

[30] The servicer agreement was part of the *Rekod Rayuan*. This was one of the documents that were signed pursuant to the master sale and purchase agreement. Vide this servicer agreement, the AmMortgage agreed to purchase assets from TM. 'Assets' is defined in this agreement and tend to include the property purchased by the respondent through the TM Staff Housing Scheme which the respondent signed with TM.

[31] At the same time, under this servicer agreement, TM agreed to appoint the appellant to perform duties for the TM Staff Housing Scheme. This Agreement sets out in detail the obligations of AmMortgage and Ambank. But it appears that whilst this agreement provides that the property purchased by the respondent is sold by TM to AmMortgage, this same agreement provides that amongst the duties and obligations of the appellant is as set out in cll 3.7, 4.2, 5.1 read together with the Schedule 2 of that servicer agreement.

[32] I also discovered that the completed purchase contract was not before the learned trial judge and it was never raised during the course of the trial. It was therefore never considered by the trial judge.

[33] I found that due to this major oversight on the part of the trial judge, she could not have been able to determine the legal nexus between the parties and consequently she was unable to determine the fundamental issue of locus standi of the appellant raised by the respondent. How does these provisions established the legal nexus between the appellant and the respondent was not addressed by the trial judge.

[34] The failure and errors of the learned trial judge is so fundamental and grave that this court had no choice but to order a retrial of the suit before another HMS.

CONCLUSION

[35] Based on the above considerations, the appeal is partially allowed, to the extent that this court allows the prayers in the memorandum of appeal citing the errors of the HMS on the issues that I had stated above. But I do not allow the appellant's prayers to overturn the trial judge's findings for the reasons I has stated earlier.

[36] This suit is ordered for retrial before a different sessions court judge.

Retrial of appellant's suit before a different sessions court judge ordered.

Reported by Ashok Kumar